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March 15, 1999

Mr. David S. Guzy
Chief, Rules and Publications Staff
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Dear Mr. Guzy:

Enclosed are comments on the Interior Department's proposed rulemaking with respect to appeals of MMS orders. The comments set forth herein express the views and opinions of the firm, and should not be attributed to any past, present or future clients of the firm.

1. §§4.918/4.919. Development of the Record. The proposed rules make several substantive changes with respect to the content of the record on appeal. Specifically, proposed §4.918(b) requires inter alia that the "parties must identify all documents and evidence that are relevant to disputed legal or factual issues involved in the appeal or that demonstrate material facts . . . ." (Emphasis added). Similarly, §4.919(b) provides in relevant part, "At a minimum, the record . . . must include the following . . . (4) Any, evidence in the control of either party that bears upon the disputed facts or issues that are subject to the appeal of the order." (Emphasis added). There are at least four significant problems with the proposed formulation of what the record must contain.

A. The Proposed Scope of the Record Is Too Broad. Defining the scope of the record in terms of relevancy as stated in the proposed rules ensures the largest record possible; one that of necessity will contain many extraneous documents that neither party will rely on. Assume for purposes of illustration that MMS conducted an audit and assessed royalties on payments made to settle litigation between a royalty payor and one of its customers. The proposed rule could be read to require the payor to include in the record every document from the litigation: every pleading, every brief, every deposition, every document produced in discovery, etc. In large commercial litigation this could encompass thousands of documents. Instead of narrowing the facts and issues,

which is one of MMS's stated goals, the proposed rule would cause the parties to spend substantial time and attention building a record, most of which would not be utilized by either party.

The relevancy standard in the proposed rule stands in stark contrast to the more stringent standards commonly applicable in state and federal court litigation. The local federal district court rule in Nebraska, for example, provides that at the pretrial conference the parties must number, inspect and list "all papers and other objects expected to be introduced as exhibits." Nebraska Federal District Court Local Rule 16.2(a)(1). Such rules recognize that many relevant documents may be reviewed during discovery (or during an audit in the context of an MMS royalty appeal) and most will have little or no bearing on the outcome of a case. These court rules force a party to weed out the unimportant. The experiences of our court system in developing a workable discovery and record building process should be instructive for the MMS. We believe a record consisting of the documents that the parties expect to introduce or rely on will better accomplish the MMS's stated goal of narrowing the facts and issues in dispute.

B. The Proposed Scope of the Record Is Unduly Burdensome. Essentially all of the documents that are relevant to disputed legal or factual matters will come from the payor's records. This will place a substantial burden on payors in terms of administrative personnel required to identify and review records, additional legal costs and substantial copying costs. We believe the imposition of such burdens is unfair and may deter some payors from pursuing otherwise meritorious appeals. Such burdens are particularly unwarranted where, as here, the great bulk of the record, as envisioned by the proposed rule, will not be introduced or relied on by either party.

C. The Proposal Eliminates the Ability to Present a Prima Facie Case and Requires the Submission of Cumulative Evidence. In many appellate cases there is at least one factual dispute that is resolved by making a prima facie case or submitting information for sample months. Assume, for example, that one of the disputed issues was whether a certain price adjustment was reported for royalty purposes during the four year period covered by the audit. In the past, the MMS would randomly select certain months for testing and require the payor to submit documentation demonstrating how the price adjustment was reported in those months. Often, such a showing by the payor was sufficient to resolve the disputed issue. Under the relevancy standard contained in the proposed rules, however, the payor would be required to put into the record evidence for all forty-eight months. Instead of simplifying the process, the proposed rule would have the opposite effect.

D. Other Comments. The section-by-section analysis that accompanies §4.918 states, "Relevant information would include information adverse to the party's position on appeal that the party is aware of, and that was considered in determining the party's position, that is not privileged or prohibited by law." This sentence is problematic for several reasons.

This sentence would seemingly require a payor to put into the record information adverse to its position even in cases where the MMS did not rely on the information in making the assessment. If this interpretation is correct, the sentence would impose a self-audit on a royalty payor. We believe such a fundamental change in the relationship between payee and payor would require new Congressional authorization.

Furthermore, it would require a payor to place itself inside the mind of the MMS. How is a payor to know what the MMS would consider "adverse information"? What happens if the MMS reviews certain information in the course of its audit but does not rely on it in making an assessment? Apparently, the MMS did not consider such information adverse to the payor's position. Is the payor now required to come forward with the information if the payor believes it is adverse? We believe this approach is inheritently unworkable.

The language ". . . that was considered in determining a party's position . . ." can produce absurd results. For example, if a payor reviewed twenty documents and decided to rely on ten of them, arguably all twenty would have to be included in the record under this proposed rule since all of them had been "considered." This is contrary to MMS's stated goal of narrowing the facts and issues in dispute.

Finally, the last portion of the sentence ". . . or prohibited by law . . ." is confusing and likely incomplete. Is the MMS referring to disclosure that is not prohibited by law or what?

2. **§4.915. Timing of When the Record Is Developed**. The proposed rules presuppose that all of the factual and legal issues are known at the record building stage. We do not share this view. Based on our prior experiences, the briefing process is necessary in order to identify all of the factual and legal issues in dispute. Consequently, we do not believe that the record can or should be developed until after briefing is completed.

There is no requirement in the proposed rules that the MMS's order must fully state the legal and factual basis of the assessment. Although the section-by-section analysis that accompanies §4.907 states that ". . . MMS or the delegated State will have stated the facts and law or regulations relied upon in issuing the order," no such requirement was found in the text of the rules themselves. Past experience teaches that most, if not all, orders issued by the MMS/designated States are factually or legally incomplete in important respects. Further, the MMS/designated States often pursue opportunistic approaches in which new theories are advanced after previously relied on theories are factually or legally discredited. Additionally, through the briefing process the parties identify the factual and legal issues that are actually in dispute. In other words, some factual and legal issues are resolved through the briefing process, and, in some cases, new factual or legal issues emerge.

We believe that record development should occur after briefing is completed as it does in litigation. At that point both parties are fully aware of the factual and legal matters in dispute. Developing the record at this stage would enable the parties to exclude extraneous material from the record. For example, assume that through briefing, the parties were able to resolve what had been a disputed issue. By delaying the building of the record until after briefing was completed, the parties avoid including in the record information about the resolved fact issue. If record building occurred at the beginning, the record would contain information about an issue that ultimately was not disputed. Our proposal would also fully protect a party's right to build its record without having to involve the IBLA as envisioned in proposed §4.923.

3. §4.923. Seeking Approval of the IBLA to Supplement the Record Is Unnecessary and Unworkable. Under the proposed rule a party would have to seek and obtain approval of the IBLA in order to supplement the record or Statement of Fact and Issues. We believe that this procedure is unnecessary and likely to be unworkable.

We have previously recommended that the MMS's appellate process should be modeled on the state and federal rules of civil procedure: briefing would identify the real factual and legal issues in dispute, and record building would occur after briefing is completed. Under this system there would be no need to involve the IBLA. It would be up to each party to put into the record the evidence that would be relied on. The fact that the MMS's proposed appellate progress includes a role for the IBLA in this regard demonstrates that the MMS's process is more complicated and cumbersome than is necessary.

The process of involving the IBLA raises a host of issues that threaten to make it unworkable. For example, a party, without changing the facts or introducing a new legal issue, could make a new argument or contention that the other party must respond to. Does a party have to seek approval from the IBLA to make a new argument or contention under these circumstances? How does the IBLA determine what is a new fact or issue? What if a seemly minor fact or legal issue later becomes the centerpiece of a party's case requiring a response from the other party? In other words, the fact or legal issue is not new, but it is put to a new or different use. What happens? What happens if a party introduces a new fact or legal issue without obtaining IBLA approval? Can the opposing party respond in such circumstances? Can the opposing party run the risk of not responding and having the case decided without its response?

In the interests of fairness, the IBLA will have to construe this provision liberally. Consequently, there are likely to be few instances when the IBLA denies a request. If this view is correct, why bother to include it at all. On the hand, if the IBLA takes a strict view, many appeals could be decided on the basis of an incomplete record. Many of the cases could wind up back before the IBLA after a judicial appeal. This would be a waste of time and resources for everyone involved.

Lastly, we believe that this procedure could be burdensome on the IBLA and slow down its resolution of appeals. It is conceivable that every appeal could involve a request to expand the record (and perhaps more than one such request). Could the IBLA handle these requests and perform its other functions?

If the MMS adopts this rule, it should consider placing the burden on the party that opposes expanding the record to establish that it would be unfair in some material respect.

4. §4.940. Dismissal for Failure to Timely File Statement of Reasons Is Overkill. Dismissal of an appeal for failure to timely file the Statement of Reason or seek an extension of time is overkill. The proposed rules already require that the appeal be timely filed. Section 4.906. Adding a second jurisdictional requirement does not seem fair or appropriate. The rule should permit late filing upon a showing of reasonable causes.

5. §4.964. Dismissal for Failure to Serve Documents Is Overkill. This proposed rule could result in the dismissal of an appeal if documents are not served as required under §4.962 and there is prejudice to the person that was not served or the adverse party. Other than because of inadvertence it is hard to imagine circumstances in which an appellant would file documents with the IBLA and fail to serve them. Consequently, a more appropriate result would be to permit the person/party who was not served an opportunity to respond. Additionally, this rule only penalizes appellants. There is no corresponding penalty if the MMS or another person fails to serve documents as required under §4.962. Why is this rule limited only to appellants?

6. General Comment. We encourage the MMS to apply the thirty-three month rule for issuing decisions to all royalty appeals not just those involving federal oil and gas leases. One unintended result of applying the rule solely to federal oil and gas leases might be to further delay decisions in cases involving solid minerals. This could occur if the IBLA has to divert its limited resources in order to meet the deadline. Something similar occurred upon passage of the federal "speedy trial" law. Because of the law, federal judges had to give priority to criminal cases causing civil cases to be delayed for substantial periods of time. Solid minerals should not be unfairly disadvantaged by this rule.

Very truly yours,

George F. Heiden

George F. Heiden
FOR THE FIRM

GFH/tav

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